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APACHE COUNTY SUPERIOR COURT

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF APACHE

IN THE MATTER OF  
**CHRISTIAN RYAN ROMERO**  
  
A person under 18 years of age

Case No. JV 2008-065  
**STATE'S RESPONSE TO MOTION TO  
SUPPRESS – SEARCH WARRANT**  
  
(Assigned to the Honorable Michael Roca,  
Judge *Pro Tem*)

The State of Arizona, by and through undersigned counsel, hereby responds to the juvenile's motion to suppress – search warrant. The juvenile argues that the judge issuing the initial search warrant, Judge Gunnels, was not neutral in this case because he *knew* both the victim Vincent Romero and the victim's son who later became the suspect in this case. However, merely knowing the victim, without more, does not alter the neutrality of a judge.

If the court were to find that Judge Gunnels was not a neutral magistrate the evidence seized should still be admissible under both the good faith and inevitable discovery exceptions.

This Response is supported by the attached Memorandum of Points and Authorities and the entire case record.

1 RESPECTFULLY SUBMITTED this <sup>14</sup>5 day of January, 2009

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4   
Michael B. Whiting  
Apache County Attorney

5 The original filed with the  
6 Clerk of the Superior  
7 Court and a copy delivered  
this 5<sup>th</sup> day of January  
2009 to

8 The Honorable Michael Roca  
9 Apache County Superior Court  
Judge *Pro Tem*

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13  
14 BY B. Heneas

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           **I. Factual Background Relevant to Motion.**

3           After the bodies of Vincent Romero and Tim Romans were found at the Romero  
4 residence, Detective Lucas Rodriguez prepared an affidavit and search warrant for the  
5 home. He took the paperwork to Judge Gunnels, the St. Johns Justice of the Peace  
6 and Magistrate. Judge Gunnels reviewed the affidavit and found probable cause  
7 existed for a search of the Romero residence.  
8

9           After issuing the search warrant, Judge Gunnels commented that he knew the  
10 Romero family and Vincent Romero. Therefore, he asked Detective Rodriguez to find  
11 another judge for any further warrants that might be needed in the case.  
12

13           **II. Legal Argument.**

14                   **A. The mere fact the Judge Gunnels knew victim Romero and the**  
15                   **juvenile does not rise to the level of a constitutional infirmity.**

16           Most constitutional challenges to the impartiality of a judge deal with pecuniary  
17 interests or when the judge crosses over and becomes active in either the law  
18 enforcement or prosecution roles. In fact, the three United States Supreme Court cases  
19 cited in the juvenile's motion deal with these two areas.  
20

21           *Connally v. Georgia*, 429 U.S. 245 (1977), was a case concerning a judge's  
22 pecuniary interest. In *Connally*, a search warrant was issued by an unsalaried justice of  
23 the peace who was paid a five dollar (\$5.00) fee for each search warrant that he issued.  
24 However, he was paid nothing for each application that he reviewed and subsequently  
25 denied. *Connally*, 429 U.S. at 246. The Court stated the justice of the peace's  
26 "financial welfare . . . is enhanced by positive action and is not enhanced by negative  
27 action. The situation . . . is one which offers a possible temptation to the average man  
28

1 as a judge or which might lead him not to hold the balance nice, clear and true  
2 between the State and the accused It is, in other words, another situation where the  
3 defendant is subjected to what surely is judicial action by an officer of a court who has a  
4 direct, personal, substantial, pecuniary interest in his conclusion to issue or deny the  
5 warrant " *Connally*, 429 U S at 250 (emphasis in original)

7 *Lo-Ji Sales, Inc. v New York*, 442 U S 319 (1979), and *Coolidge v New*  
8 *Hampshire*, 403 U S 443 (1971), concern judge's becoming actively involved in either  
9 the investigation and/or prosecution of a case In *Lo-Ji* a town justice issued a search  
10 warrant that authorized the search of an adult bookstore and the seizure of two specific  
11 obscene films. *Lo-Ji Sales*, 442 U S at 321 The warrant did not specify any other  
12 items to be seized, but authorized the seizure of any items the town justice might find  
13 obscene upon examination at the bookstore *Id* The town justice then accompanied  
14 law enforcement officials to the adult book store and directed the seizure of various  
15 items that he deemed obscene These items were subsequently added to the original  
16 warrant *Lo-Ji Sales*, 442 U S at 322-24 The Court explained when the town justice's  
17 acts were neither neutral nor detached The town justice "became a member, if not the  
18 leader, of the search party which was essentially a police operation Once in the store,  
19 he conducted a generalized search under authority of an invalid warrant, he was not  
20 acting as a judicial officer but as an adjunct law enforcement officer " *Lo-Ji Sales*, 442  
21 U S at 326-27

25 In *Coolidge v New Hampshire*, 403 U S 443 (1971), the probable cause  
26 determination for a search warrant was made by the state attorney general, who was  
27 actively in charge of the investigation and later was the chief prosecutor at the trial The  
28 prosecutor made the probable cause determination while he was acting in the capacity

1 of a justice of the peace *Coolidge*, 403 U S at 450 The Court held “that the seizure  
2 and search . [could not] constitutionally rest upon the warrant issued by the state  
3 official who was the chief investigator and prosecutor in [the] case.” *Coolidge*, 403 U.S.  
4 at 453

5 Constitutional challenges to a judge’s impartiality may include other factors that call  
6 into question a judge’s impartiality The courts, however, have been careful to set clear  
7 limits to claims that non-pecuniary interests defeat magistrate neutrality and detachment  
8 under the Fourth Amendment For example, mere past association or knowledge of a  
9 defendant or victim is generally not deemed to give rise to a constitutional infirmity  
10

11 As was colorfully stated in *United States v Heffington*, 952 F 2d 275 (9<sup>th</sup> Cir  
12 1991)  
13

14 Assuming that an appearance of partiality may lurk in the fact that  
15 judges and police officers in rural counties often know more about local  
16 criminal recidivists than their more urban colleagues, we are not prepared  
to disqualify small town judges on demand

17 *Heffington*, 952 F 2d at 279 Similarly, past legal representation either on behalf of or  
18 adverse to a defendant is not ordinarily grounds for attacking the neutrality or  
19 detachment of a magistrate *United States v Guthrie*, 184 Fed Appx 804, 807 (10<sup>th</sup> Cir.  
20 2006) (holding that there was no Fourth Amendment violation where magistrate  
21 represented, several years earlier, son of owner of private residence to be searched),  
22 *United States v Outler*, 659 F 2d 1306, 1312 (5<sup>th</sup> Cir 1981) (holding no nexus between  
23 magistrate’s prior prosecution of the defendant and subsequent proceedings), *State v.*  
24 *Mandravelis*, 325 A 2d 794, 795 (N H 1974) (noting that before becoming a judge the  
25 magistrate represented the accused on several charges, some of which resulted in  
26 conviction, and had knowledge of defendant’s problems with drugs when younger, *State*  
27  
28

1 *v Slaughter*, 315 S E 2d 865, 869-70 (Ga 1984) (holding no Fourth Amendment  
2 violation when issuing magistrate was also the attorney of record in a civil case against  
3 the defendant)

4 Besides showing that past association or knowledge of a defendant or victim is  
5 generally not deemed to give rise to a constitutional infirmity, the above cases also  
6 stand for the proposition that there is no Fourth Amendment requirement for the perfect  
7 or best neutral and detached magistrate See *Heffington* 952 F 2d at 279-80

8  
9 In the instant case, Judge Gunnels is purportedly a friend of the Romero family  
10 and knew both Vincint Romero and the juvenile. In and of itself, this relationship does  
11 not rise to the objective appearance that arises from circumstances that would offer a  
12 temptation to the average person as an otherwise neutral adjudicator See, e g., *State*  
13 *v Edman*, 915 A 2d 857, 867 (Conn 2007)

14  
15 **B. If the court were to find that Judge Gunnels was not a neutral**  
16 **magistrate the evidence seized should still be admissible under both**  
17 **the good faith and inevitable discovery exceptions.**

18 If the Court finds that Judge Gunnels was not a "neutral magistrate" and the warrant  
19 is invalid, the evidence seized should still be admissible at trial under both the good faith  
20 and inevitable discovery exceptions Suppression of evidence is a last resort, not first  
21 impulse *United States v Leon*, 468 U S 897 (1984)

22 The Supreme Court recently reiterated that the exclusionary rule is to be applied  
23 only when its deterrence benefits outweigh its substantial societal costs

24  
25 In *Weeks v United States*, 232 U S 383, 34 S Ct 341, 58  
26 L Ed 652 (1914), we adopted the federal exclusionary rule  
27 for evidence that was unlawfully seized from a home without  
28 a warrant in violation of the Fourth Amendment We began  
applying the same rule to the States, through the Fourteenth  
Amendment, in *Mapp v Ohio*, 367 U S 643, 81 S Ct  
1684, 6L Ed 2d 1081 (1961)

1           Suppression of evidence, however, has always been our last  
2           resort, not our first impulse. The exclusionary rule generates  
3           "substantial social costs," *United States v. Leon*, 468 U.S.  
4           897, 907, 104 S. Ct. 3405 (1984), which sometimes include  
5           setting the guilty free and the dangerous at large. We have  
6           therefore been "cautio[us] against expanding" it, *Colorado v.*  
7           *Connelly*, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473  
8           (1986), and "have repeatedly emphasized that the rule's  
9           'costly toll' upon truth-seeking and law enforcement  
10          objectives presents a high obstacle for those using [its]  
11          application," *Pennsylvania Bd. Of Probation and Parole v.*  
12          *Scott*, 524 U.S. 357, 364-65, 118 S. Ct. 2014, 141 L. Ed. 2d  
13          344 (1998) (citation omitted). We have rejected  
14          "[i]ndiscriminate application" of the rule, *Leon, supra*, at 908,  
15          104 S. Ct. 3405, and have held it to be applicable only "where  
16          remedial objectives are thought most efficaciously served,"  
17          *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613,  
18          38 L. Ed. 2d 561 (1974) – that is, "where its deterrence  
19          benefits outweigh its 'substantial social costs,'" *Scott, supra*,  
20          at 363, 118 S. Ct. 2014 (quoting *Leon, supra*, at 907, 104 S.  
21          Ct. 3405).

22          *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006), see also *United States v. Hector*,  
23          474 F.3d 1150 (9<sup>th</sup> Cir. 2007).

24                 In the instant case, the deterrence benefits do not outweigh the substantial  
25          societal costs of suppressing the evidence. There is no allegation that law enforcement  
26          engaged in any inappropriate activity to obtain the warrant. Therefore, suppressing the  
27          evidence obtained would have no deterring effect on law enforcement. The only result  
28          would be a substantial societal cost of suppressing the evidence and prohibiting any  
29          prosecution for this double homicide.

30                 The good faith exception to the exclusionary rule is set forth in Arizona Revised  
31          Statutes section 13-3925.

32                 A         Any evidence that is seized pursuant to a search  
33          warrant shall not be suppressed as a result of a violation of  
34          this chapter except as required by the United States  
35          Constitution and the constitution of this state.

1           B       The trial court shall not suppress evidence that is  
2 otherwise admissible in a criminal proceeding if the court  
3 determines that the evidence was seized by a peace officer  
4 as a result of a good faith mistake or technical violation

5       *See also United States v Leon*, 468 U S 897 (1984)

6       The juvenile does not argue a lack of probable cause for the search, but rather that  
7 Judge Gunnels was not a "neutral magistrate." The exclusionary rule's primary purpose  
8 is to deter illegal police conduct. The proper application of the exclusionary rule is  
9 determined by weighing the potential costs and benefits of excluding the evidence in a  
10 particular case. *State v Booker*, 212 Ariz 502, 135 P 3d 57 (Ct App 2006) *citing*  
11 *United States v Candelaria*, 414 U S 335, 349, *Leon*, 468 U S at 906

12       In the instant case there was no misconduct by the officers involved. Invoking the  
13 exclusionary rule for any mistake made by Judge Gunnels would serve as no  
14 deterrence to the officers involved and would not serve the purpose for which it was  
15 created.

16       Similarly, if an item was unlawfully searched or seized, it should not be suppressed if  
17 it would have been inevitably discovered. *State v Hein*, 138 Ariz 360, 674 P 2d 1358  
18 (1983), *State v Jones*, 185 Ariz 471, 917 P 2d 200 (1996), *State v Hackman*, 189 Ariz  
19 505, 943 P 2d 865 (Ct App 1997). *See also Nix v. Williams*, 467 U.S. 431 (1984). The  
20 Ninth Circuit recently stated  
21  
22

23           In this circuit, the "inevitable discovery" doctrine, first  
24 recognized in *Nix v Williams*, 467 U S 431, 104 S Ct 2501,  
25 81 L Ed 2d 377 (1984), provides that if, "by following routine  
26 procedures, the police would inevitably have uncovered the  
27 evidence," then the evidence will not be suppressed despite  
28 a constitutional violation. *United States v Ramirez-Sandoval*, 872 F 2d 1392, 1399 (9<sup>th</sup> Cir 1989). That concept  
is closely related to the "independent source" doctrine, which  
provides that evidence discovered by independent legal



means should not be suppressed even though there was an  
illegal search as well *Id* At 1396

*United States v Ankeny*, 502 F 3d 829, 834 n 2 (9<sup>th</sup> Cir 2007)

### III. Conclusion.


Judge Gunnels knowing victim Romero and the juvenile does not rise to the level of  
a constitutional infirmity Merely knowing the victim is not a circumstance that would  
offer a temptation to the average person to act as an otherwise neutral adjudicator

While Judge Gunnels may not have felt comfortable being involved in this case  
because he knew the family, that personal feeling does not mean he was not a neutral  
and detached magistrate

Therefore, the search warrant issued by Judge Gunnels was constitutionally valid  
and the juvenile's argument should be dismissed

Alternatively, if the Court finds that Judge Gunnels was not a "neutral magistrate"  
and the warrant is invalid, the evidence seized should still be admissible at trial The  
exclusionary rule is to be applied only when its deterrence benefits outweigh its  
substantial societal costs In this case, with no improper conduct by law enforcement  
there would be no deterrence effect by suppressing the evidence, only a substantial  
societal cost in preventing the prosecution of this double homicide Therefore, the  
evidence should not be suppressed even if Judge Gunnels was not a "neutral  
magistrate in this case

DATED this 5<sup>th</sup> day of January, 2009

  
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Michael B. Whiting  
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